United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

657

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23,007

UNITED STATES OF AMERICA, Appellee

v.

HAROLD A. SMITH, Appellant

On Appeal From the United States District Court
for the District of Columbia

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Dated: October 10, 1969

STATEMENT OF THE ISSUE INVOLVED

Whether, when appellant's petition for relief under 28 U.S.C. 2255 alleges that his plea of guilty was involuntary because caused by the existence of a confession extracted by coercion and in violation of the Mallory Rule, the district court erred in denying the petition without a hearing upon the ground that the files and records in the case conclusively showed that appellant was entitled to no relief.

This case has not been previously before this Court.

REFERENCES TO RULINGS

The one ruling made by the district court is its Order dated and entered April 14, 1969.

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*Cases or authorities chiefly relied upon are marked by asterisks.

STATEMENT OF THE CASE

Appellant, presently incarcerated in a North Carolina prison where he is serving concurrent sentences imposed by state and federal courts, prosecutes this appeal from an order of the United States District Court for the District of Columbia (Pine, J.) denying appellant's "Petition for a Post Conviction Hearing, 28 U.S.C. 2255, In Forma Pauperis," which was treated as a motion for relief under 28 U.S.C. 2255. The petition was denied without a hearing, on the ground that the files and records of the case conclusively showed that appellant was entitled to no relief. The relevant facts follow, and unless otherwise indicated were uncontroverted below.

A. Background of the Litigation.

On July 23, 1960, at approximately 2:15 a.m., Harold A. Smith (hereinafter "appellant") and two other men were arrested in the District of Columbia in connection with an armed robbery which had just occurred at a local restaurant (appellant's Petition for a Post Conviction Hearing, 28 U.S.C. 2255, In Forma Pauperis, filed March 3, 1969 (hereinafter "appellant's Petition"), page 2; appellee's Opposition to Motion To Vacate Sentence Pursuant

to Title 28 U.S.C., Section 2255, filed April 9, 1969 (hereinafter "Government's Opposition"), page 1).[1/] Appellant was taken to a police station and placed in a cell for approximately one-half hour, and then was taken from the cell to a large office where he was questioned by two-man teams of police officers. He was questioned all through the remainder of the night and into the next morning. When he asked for something to eat he was told he would be given something after he admitted to the robbery (appellant's Petition, page 2).

In the morning, a break in the questioning occurred to allow appellant to be put through a line up and fingerprinted (ibid.). But then the questioning resumed and continued until he made an oral confession to participation in the restaurant robbery (appellant's Petition, pages 2 and 3).[2/] At approximately 2:15 p.m. in the afternoon, some 11 hours after his arrest, he was taken before a United States Commissioner (appellant's Petition, page 3).

1/ All references are identified and are contained in the original record in this Court.

2/ The time of appellant's confession is not indicated.

Between the time of his arrest and the time he was taken before the Commissioner, he was not advised of his right to remain silent or that the courts appointed attorneys to represent indigent persons.[3/] He was tired, sleepy and hungry but was not allowed to sleep or eat before he confessed (appellant's Petition, pages 2, 3 and 4).

Before the Commissioner, a complaint was presented and appellant and the two men arrested with him were advised that they were entitled to a preliminary hearing and to retain counsel, that they were not required to make a statement, that any statement they did make could be used against them, and that they could cross-examine witnesses and introduce evidence in their own behalves (Government's Opposition, page 1; U.S. Commissioner's Report of July 23, 1960, filed July 25, 1960 (hereinafter "Commissioner's Report")). Appellant and the other men were not told that the court would furnish attorneys for them free if they did not have the money to hire them

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3/ Appellant asserts he was completely destitute and had no money or means to hire an attorney (appellant's Petition, page 3).

(appellant's Petition, page 5; Commissioner's Report). The three men decided to waive preliminary hearing and were bound over for action by the Grand Jury (Commissioner's Report; Government's Opposition, page 1).

On July 25, 1960, two days after the waiver of preliminary hearing and while appellant was incarcerated awaiting action by the Grand Jury, he signed a written version of his previous oral confession, believing officers who told him that it was the best thing to do, that it was better than relying on the memory of those who had heard the oral confession, and that by appellant's cooperation the judge would not be so hard on him (appellant's Petition, pages 6 and 7).

On August 15, 1960, the Grand Jury returned an indictment charging appellant and the two other men with seven counts of robbery by force and violence and one count of assault with a deadly weapon. In addition, appellant alone was indicted on an additional count of carrying a pistol without a license (Government's Opposition, page 1; appellant's Petition, page 1). On August 19, 1960, appellant was arraigned and a plea of not guilty was entered (Docket Entries in the District

Court, hereinafter "Docket Entries"). Appellant was then remanded to the D. C. Jail and the case was referred for the appointment of counsel. Counsel was appointed on August 22, 1960 (ibid.).

On October 26, 1960, appellant and his court-appointed attorney appeared before a judge of the United States District Court for the District of Columbia (Pine, then C. J.) and appellant withdrew his previous plea of not guilty and pleaded guilty to all nine counts of the indictment (Transcript of October 26, 1960 Proceedings, filed November 8, 1960 (hereinafter "Transcript"), pages 1-11). The transcript reveals nothing as to what part the prior confessions played in appellant's decision to plead guilty (ibid.).

Sentencing occurred on December 2, 1960, and appellant received consecutive and concurrent terms on various counts of the indictment resulting in effect in a total sentence of from twelve to thirty-six years (appellant's Petition, page 1; Transcript of Sentencing Proceedings).

Subsequently (in 1961), appellant was tried in North Carolina for the offense of first degree murder and was given a life term (Government's Opposition, page 2). He presently is serving his federal and state sentences concurrently in Central State Prision, Raleigh, North Carolina. He will become eligible for parole from his state sentence in 1971, but will not become eligible for parole from his federal sentence until July 1972 (appellant's Petition, page 1; Government's Opposition, page 2).

B. The Instant Proceedings.

On March 3, 1969, appellant filed in the court below a verified "Petition for a Post Conviction Hearing, 28 U.S.C. 2255, In Forma Pauperis," and an affidavit for leave to proceed in forma pauperis. The petition alleged most of the facts just detailed and made the following specific complaints: (1) that there was an unnecessary delay -- for the sole purpose of extracting damaging statements from him -- before appellant was taken before the U. S. Commissioner; (2) that he had no attorney when he decided to waive preliminary hearing; (3) that although counsel was appointed the appointment

was not adequate or effective; (4) that the counts of the indictment against him did not allege -- with sufficient clarity for appellant to understand -- a particular offense or crime; (5) that he was not formally or sufficiently charged; (6) that there was no evidence presented to prove appellant committed the offenses charged; and (7) that there was no evidence that the offenses charged had even been committed (appellant's Petition, pages 1-8, 9). The relief requested included the granting of a hearing at which appellant could be present (appellant's Petition, page 9).

The Government opposed the petition in an "Opposition to Motion To Vacate Sentence Pursuant to Title 28 U.S.C., Section 2255," filed April 9, 1969. Without addressing itself to the question of whether in fact appellant had not been advised by the Commissioner of his right to have counsel appointed, the Government argued that that particular claim was without merit as a matter of law because of this Court's decision in Blue v. United States, 119 App. D.C. 315, 342 F.2d 894 (1964), cert. denied, 380 U.S. 944 (1965) (Government's Opposition, pages 3-4).

With respect to appellant's other contentions, the Government argued that they were not meritorious in fact or in law. In this connection, the Government pointed to the transcript of proceedings taken when appellant was sentenced on October 26, 1960, which it said clearly showed that appellant -- represented by counsel -- had the charges carefully explained to him; said he fully understood them; said he had discussed the matter of entering a guilty plea with his attorney; said that he was satisfied with the services of his attorney, and voluntarily changed a plea of not guilty to guilty (Government's Opposition, pages 4-7). The Government also pointed to appellant's subsequent statement -- that he pleaded guilty on his gamble that his federal charge would keep him out of the gas chamber for his state offense -- as further refuting his present assertion that his guilty plea was not voluntary but was caused by the prior oral and written confessions (Government's Opposition, pages 5-6).

On April 14, 1969, the court below (Pine, J.) dismissed appellant's petition without a hearing, on the

ground that the pleadings, files and records conclusively showed that appellant was entitled to no relief (District Court Order of April 14, 1969, hereinafter "District Court Order"). The court entered no findings on the question of whether appellant's guilty plea was voluntary or had been influenced by the existence of the prior confessions.

By letter to the court below dated April 16, 1969, and filed April 23, 1969, appellant expressed his desire to appeal and to proceed in forma pauperis. The letter was treated as the notice of appeal, and the following day (April 24, 1969) the court ordered allowance of the transcript and trial proceedings to be reproduced at the expense of the Government. The case was then referred to this Court for appointment of counsel (Docket Entries). The record on appeal was filed in this Court on May 5, 1960, and after several previous appointments of other counsel and subsequent withdrawals, the Court appointed Julius M. Greisman on August 19, 1969.

STATUTE INVOLVED

Section 2255 of Title 28 of the United States Code, 62 Stat. 967 (1948), as amended, provides in pertinent part as follows:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.
>
> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the

judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

* * * * *

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S PETITION WITHOUT A HEARING 4/

It is well settled that a motion for relief under 28 U.S.C. 2255 can be denied without a hearing only if the motion and the files and records of the case "conclusively show" that the prisoner is entitled to no relief. Sanders v. United States, 373 U.S. 1, 15 (1963); United States v. Hayman, 342 U.S. 205, 219 (1952); Dayton v. United States, 115 App. D.C. 341, 319 F.2d 742 (1963),

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4/ For consideration of this point, the Court's attention is directed to appellant's Petition; the Government's Opposition; the arraignment Transcript; and the District Court's Order.

cert. denied, 375 U.S. 947 (1963). In this case, appellant's petition challenged the voluntary character of his guilty plea in that the plea was motivated by the existence of prior confessions obtained in violation of his rights. The motion thus raised the factual question of whether the confessions -- which undoubtedly could not have themselves been used to convict the appellant [5/] -- did indeed cause appellant to plead guilty.

In denying the petition without a hearing and without stating any findings of fact, it is not clear whether the court below was resolving the factual question against appellant on the basis of the files and records, or was merely holding that even if what appellant

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5/ If, as appellant's petition asserts, the police refused to take him before a U. S. Commissioner until they could question him (relentlessly and without food) and force him to confess, then a conviction based on the oral confession made during this period would have to be reversed. See Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943); Ricks v. United States, 118 App. D.C. 216, 334 F.2d 964 (1964). The same would be true of the later written confession, either on the theory that it was the fruit of the former invalid confession, see Killough v. United States, 114 App. D.C. 305, 315 F.2d 241 (1962); Jackson v. United States, 106 App. D.C. 396, 273 F.2d 521 (1959), or on the ground that it was induced by the promise that the judge would not be so hard on appellant, see Malloy v. Hogan, 378 U.S. 1, 7 (1964).

said was true it would not as a matter of law entitle him to relief. In either case the district court's assessment would be in error and a nearing on the motion should have been held, as we now show.

a. Turning first to the legal point, the Supreme Court has made it clear that a conviction based upon a guilty plea induced by some factor which deprives it of the character of a voluntary act is open to collateral attack under 28 U.S.C. 2255. See Machibroda v. United States, 368 U.S. 487, 493 (1962) and cases there cited. See also Sanders v. United States, 373 U.S. 1 (1963).

Furthermore, there is authority directly in point on the more precise question in issue here, namely, that a prisoner may raise, by a motion under 28 U.S.C. 2255, the issue of whether his guilty plea was involuntary because induced and coerced by the existence of prior, invalid confessions. See United States v. Morin, 265 F.2d 241 (3rd Cir. 1959).

The facts in Morin are strikingly similar to the ones in this case. There, a prisoner was challenging by means of a motion under 28 U.S.C. 2255 the validity of his conviction based on his plea of guilty, on the

ground that the guilty plea was involuntary because induced and coerced by prior, illegally obtained confessions. After his arrest the prisoner was not promptly taken before a magistrate but was questioned steadily until, "worn out," he made an oral and written confession of his guilt. 265 F.2d at 243. The confessions were never used against him, however, and his conviction rested upon his plea of guilty with the advice of appointed counsel. The district court denied the Section 2255 motion, but significantly only after holding a hearing and making a finding of fact that the guilty plea was not based on the confessions. See United States v. Morin, 163 F. Supp. 941 (W.D. Pa. 1958). The court of appeals affirmed. The appellate court agreed with the prisoner's legal argument that he could raise the issue of the voluntariness of his guilty plea in view of the prior invalid confessions, but the court respected the district court's resolution of that question after a hearing and the making of findings of fact. 278 F.2d at 246.

In view of the Morin case and the other authorities we have referred to, we submit that it was error

for the court below to have denied appellant's petition without a hearing if the court was doing so on the ground that, even if the facts stated were true, as a matter of law appellant was entitled to no relief.[6/]

b. We further submit that, if what the district court did was to have resolved the factual issue against appellant, that resolution without a hearing would be error since the motion and the files and records in the case do not contain enough information on the issue to permit one to say that it is shown conclusively that appellant is entitled to no relief.

It is first to be noted that the court below did not purport to make any factual finding or resolution of any kind. The only document the court entered was its April 14 "Order" denying relief because "it appears to

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6/ This Court's decision in Watts v. United States, 107 App. D.C. 367, 278 F.2d 247 (1960) -- not relied upon by the district court -- though a similar case, is not contrary authority. There this Court said that Section 2255 relief was not available to a prisoner who claimed that his own guilty plea was involuntary because induced by his companion's confessions. What the Court held was that, as a matter of law, such action did not constitute an involuntary plea. The Court recognized, however, that an "attack is permitted under Section 2255 where the plea is truly involuntary, or where its reliability is doubtful because of [the prisoner's] . . . mental or physical condition when he made the plea." 278 F.2d at 250. Thus Morin and Watts are compatible.

the court that" (in the language of 28 U.S.C. 2255) "the motion and the files and records of this case conclusively show that petitioner is entitled to no relief . . ." (District Court Order). Obviously, this is of no help to this Court in deciding whether the district court did reach the factual issue, and, if it did, what it relied upon to resolve the issue and whether the resolution is well supported.

But further, and more important, we think the files and records do not contain enough information to have permitted the district court to resolve the issue without a hearing. The record shows only that before and during his arraignment appellant had counsel; that, as usual, each count of the indictment was read to appellant; that the court asked appellant about the truth of the facts charged in each of the nine counts of the indictment and appellant admitted them; that the court asked appellant whether his change to a guilty plea was being made voluntarily -- to which he answered "Yes"; that appellant was asked whether the guilty plea was being induced by any threats or promises of any kind, to which he answered "No"; and that the court asked appellant

whether he had discussed the plea with his attorney and whether he was satisfied with his attorney -- to which he again answered "Yes" (Transcript, pages 1-10).

Thus, appellant's confessions were simply not mentioned. There is no indication in the record that the trial judge was aware of their existence. The answers appellant gave to the other questions put to him certainly do not conclusively show that the confession did not in fact cause the guilty plea. If anything, the answers are merely factors that may be considered at a hearing to resolve the causal issue. Machibroda v. United States, supra, 368 U.S. at 494; United States v. Hayman, supra; United States v. Morin, supra, 265 F.2d at 245; Castro v. United States, 396 F.2d 345, 348 (9th Cir. 1968); Kennedy v. United States, 249 F.2d 257, 258 (5th Cir. 1957), cert. denied, 359 U.S. 994 (1959); United States v. Wantland, 199 F.2d 237, 238 (7th Cir. 1952). It is to be noted that in the Morin case, the record contained similar recitations by the prisoner in response to questions by the court about the voluntariness of the guilty plea. There was also the same absence of any mention of illegal detention or coerced confession,

as there is here. See 265 F.2d at 244. Nevertheless, both courts in Morin held that a hearing was necessary before the factual issue could be finally resolved against the prisoner.

Furthermore, the case here is not made any stronger by the existence in the record (see Government's Opposition, page 5) of the letter appellant wrote in 1962 to the sentencing judge requesting a reduction of sentence, in which he stated:

> "If you will recall, Your Honor, my co-defendants and I were fighting extradition to a murder charge in the state of North Carolina. Because we were at the losing end of the battle, I pleaded guilty to the charges there in the District, so that I would be given time with the federal Government, . . . to stay out of the Gas Chamber in North Carolina."

Even this statement, if true, does not conclusively rule out the possibility that the existence of the prior invalid confessions contributed to appellant's guilty plea. For example, if appellant had known that the confession could not have been used against him, would he have taken the same gamble? That is an issue of fact to be resolved; and the 1962 letter, like the recitations appellant made

at the arraignment hearing, can be considered in conjunction with everything else at a hearing to reach a resolution. See Machibroda v. United States, supra, and the cases cited herein at p. 17 , supra.

c. United States v. Morin, supra, is the one case that we have found in which a prisoner made the precise argument appellant makes here; and in Morin, as we have pointed out, it was held that a hearing was necessary to resolve the factual issue since that issue could not be resolved either by the motion itself or the files and records. The same situation is present here. In that respect, this case is like the one before the Supreme Court in Machibroda v. United States, supra, where the Court held that a hearing was required because the factual allegations contained in that prisoner's motion were ones upon which the record in that case shed no real light and could not be resolved by the district judge drawing upon his own personal knowledge or recollection. 368 U.S. at 494-495. See also Sanders v. United States, supra, 373 U.S. at 19-20, and United States v. Hayman, supra, 342 U.S. at 219, two other instances where the Supreme Court reversed the denial of

relief under 28 U.S.C. 2255 because a hearing had not been held to resolve an issue which could not be conclusively resolved on the basis of the files and records. 7/

CONCLUSION

For the foregoing reasons, we respectfully submit that the district court erred in denying appellant's petition without a hearing, and the court's order should be reversed and the case remanded for a hearing or such relief as this Court deems appropriate. 8/

Respectfully submitted,

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Dated: October 10, 1969

7/ It appears that neither the Morin case nor the three Supreme Court cases were brought to the attention of the district court.

8/ If a hearing is ordered, by way of guidance to the district court it may be appropriate to suggest that appellant's claim that he did not understand the counts of the indictment also be investigated, since this too bears on the question of the voluntariness of his guilty plea.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,007

UNITED STATES OF AMERICA, APPELLEE

v.

HAROLD A. SMITH, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
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C.A. No. 504-69 (Cr. No. 687-69)

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TABLE OF CASES

OTHER REFERENCE

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the District Court erred in denying appellant's petition for relief under 28 U.S.C. § 2255 without a hearing.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,007

UNITED STATES OF AMERICA, APPELLEE

v.

HAROLD A. SMITH, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By order dated April 14, 1969, the District Court, David A. Pine, J., denied appellant's "Petition for a post conviction hearing, 28 U.S.C. 2255, in forma pauperis." That petition was denied, without a hearing, on the basis that it appeared to the court that the motion and the files and records of the case conclusively showed appellant was entitled to no relief.

Appellant was arrested July 23, 1960, and charged with the armed robbery of several people at a restaurant in the 1100 block of 14th Street, N.W. On the same day he was taken before the United States Commissioner, who

advised him that he was entitled to a preliminary hearing, that he could retain counsel, that he was not required to make a statement, that any statement he did make could be used against him and that he could cross-examine the witnesses and introduce evidence in his own behalf. (U.S. Commissioner's Report of July 23, 1960, filed July 25, 1960.) Appellant and his co-defendants waived preliminary hearing that day and were held for action of the grand jury.

An indictment returned August 15, 1960, charged appellant with seven counts of robbery, one count of assault with a dangerous weapon, and one count of carrying a pistol without a license. On August 19, 1960, he was arraigned and entered a plea of not guilty. On August 22, 1960, the court appointed counsel for appellant. That counsel moved for a pre-trial mental examination, and the court granted the request on September 16, 1960. On October 26, 1960, the court received the report from St. Elizabeths Hospital which revealed that appellant, in the opinion of the hospital, was competent to stand trial and that he did not suffer from a mental disease or defect at the time of the robberies.

On October 26, 1960, appellant then withdrew his plea of not guilty previously entered and entered a plea of guilty to the entire indictment (Tr. 1-11). Appellant's co-defendants' cases were dismissed, and they were released to North Carolina authorities to face charges in that state. Appellant was sentenced to separate terms of imprisonment on the several counts, the effect of which was imprisonment for twelve to thirty-six years.

At the October 26 proceedings the court examined appellant to determine the voluntariness of his plea. Appellant was questioned by the clerk of the court whether he had been advised and understood that he had a right to a trial by jury. Appellant answered affirmatively and stated he understood he would lose that right if he entered a plea of guilty. Appellant, upon being questioned whether his plea was voluntarily entered and whether he had been threatened or improperly induced into enter-

ing a guilty plea, stated that it was in fact voluntary, that he did in fact commit the offenses for which he was charged by indictment and that he had not been threatened or coerced into entering this plea (Tr. 1-11, Oct. 26, 1960). Additionally the clerk and the court inquired into the factual background of the charges, and appellant admitted having robbed his victims at the location alleged and having in fact pointed the gun at one of his victims and shot at him when that victim attempted to escape from the scene of the crime. Appellant made these admissions after acknowledging the circumstances surrounding the crime as stated by the prosecutor. Appellant was fully satisfied with the services of his attorney and admitted he had discussed the matter of the guilty plea with his attorney. After this extensive hearing the plea of guilty was accepted by the court.

On June 17, 1962, in an effort to gain a reduction of sentence, appellant wrote a letter to the sentencing judge in which he requested a reduction of his sentence. The letter in pertinent part stated:

> If you will recall, Your Honor, my co-defendants and I were fighting extradition to a murder charge in the state of North Carolina. Because we were at the losing end of the battle, I pleaded guilty to the charges there in the District, so that I would be given time with the Federal Government, [illegible word], to stay out of the gas chamber in North Carolina.

In his § 2255 petition appellant contended his sentence should be set aside primarily because his plea of guilty was involuntary. In support of his contention appellant alleged that his plea was induced by two unlawful confessions obtained by the police in violation of *Mallory* v. *United States*, 354 U.S. 449 (1957). Appellant alleged nine years later that his attorney did not inform him the confessions could not be used against him. Appellant additionally alleged he was not informed of his right to appointed counsel before the United States Commissioner and claimed that the absence of counsel at this stage

hampered all subsequent stages. Appellant also made additonal allegations in support of his claim that his guilty plea was not voluntary.

As a result of petitioner's incarcerations for the District of Columbia robberies and the North Carolina murder, he will be eligible for parole from his state sentence in 1971 and eligible for parole from his federal sentence in July 1972 (appellant's petition, p. 1).

ARGUMENT

The files and records of the case conclusively show that appellant is entitled to no relief and that a hearing in the court below was unnecessary.

As a matter of law, this Court's decision in *Watts* v. *United States*, 107 U.S. App. D.C. 367, 278 F.2d 247 (1960), bars relief to appellant. When a defendant has effective defenses available, and counsel has been appointed to present those defenses and when the record shows that he competently and intelligently entered his plea, a hearing on a § 2255 motion is not necessary under applicable law. *Watts* states that "a plea constitutes the highest form of voluntary choice known to law—confession in open court." *Watts* v. *United States*, *supra*, 107 U.S. App. D.C. at 370, 278 F.2d at 250. "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U.S.C. § 2255 requires that a hearing be held to resolve any issues raised by a § 2255 motion. The language of the statute, however, does not "strip the District Courts of all discretion to exercise their common sense." *Machibroda* v. *United States*, 368 U.S. 487 (1961). On two grounds, therefore, the District Court's common sense evaluation of this case was proper.

First, it is readily apparent from the transcript that appellant was well aware of the crime to which he was entering a guilty plea and the circumstances surrounding that crime. He was fully advised of his rights and was represented by counsel. Consequently, his guilty plea as

recorded effectively waived his rights to raise the questions he now raises.[1] As a matter of law, if the only question he raises is the involuntariness of his plea due to alleged illegal confessions, and the record shows a proper plea in all respects with appointed counsel, no relief is available. *Watts* v. *United States*, *supra*, 107 U.S. App. D.C. at 370, 278 F.2d at 250 (1960).

Second, if he raises a question of fact based on the occurrences set forth in his brief and petition, the records and files of this case conclusively show the District Court's action to be proper. In 1960 he entered a plea of guilty which in all respects shows knowledge of the crime committed and voluntariness of the plea. In 1962 appellant wrote a letter to the court in which he expressly told the court what prompted his plea. Coupling these two factors against allegations in appellant's petition and brief, appellee submits that the files conclusively show appellant's state of mind and refute appellant's contention. The District Court need not hold a hearing and ignore common sense and good judgment.

Appellant cites *United States* v. *Morin*, 265 F.2d 241 (3d Cir. 1941), in support of his argument that a hearing is mandatory. *Morin* stands for the proposition that a hearing is necessary where the files and records do not show a resolution of a question of fact raised by the § 2255 motion. 265 F.2d at 245. However, *Morin* does not invalidate the District Court's action here. Where as here the District Court has a letter from appellant two years subsequent to his plea, a transcript showing appellant's understanding of the charge and the voluntariness of his plea, and appointed counsel to that plea, the court does not need to look into allegations made nine

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[1] Appellant originally asserted that the failure to advise him of his right to appointed counsel at his appearance before the U.S. Commissioner fatally flawed subsequent proceedings. This question has been disposed of by *Blue* v. *United States*, 119 U.S. App. D.C. 315, 342 F.2d 894 (1964). Certainly counsel could have discovered any defects, and his failure to do so bars post-conviction relief. Appellant apparently has abandoned this position on appeal.

years later, because even if true the files refute them. *Kennedy* v. *United States*, 249 F.2d 257 (5th Cir. 1957), *cert. denied*, 359 U.S. 994 (1959).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
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